APPENDIX A

ROAD SAFETY AUDITS - LEGAL ISSUES

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INTRODUCTION

The "Road Safety Audit" is a new concept in British Columbia and like any new concept, it should be carefully reviewed to determine what impact it may have before it is implemented The purpose of this segment of the report is to assess the potential legal impact upon the participants in the audit process

Who will bear liability, if at all, if an audited road proves to be unsafe? What happens if an unaudited road proves to be unsafe? These are the questions to be answered by the law

We are a society of laws By way of general illustration, and not to be exhaustive, there are laws concerning the governance of the state (constitutional law), the standard of behaviour of citizens toward society (criminal law), the commercial relations between citizens (contract law) and the conduct of citizens toward each other (tort law) One or more of these areas of law may be concerned when an audited road (or an unaudited road) proves to be unsafe

As an example, a hypothetical auditor has a contract with a road owner to conduct an audit It is primarily a matter of contract law whether the auditor owes a duty to the road owner to perform the audit competently and, if he fails to do so, he may be liable for breach of that contract In addition, it may be that common law duties of care arise under tort law which operate in parallel with the duties under contract law

Continuing with the example, our hypothetical auditor may also owe a duty of care to a larger segment of society as a matter of tort law to perform the audit competently to keep that segment safe in its use of the road If so, liability for any injury to a member of that larger segment of society will be determined by tort law rather than contract law

Liability arising from contract is virtually self-regulating, being almost entirely dependent upon the terms of the agreement between the contracting parties Any review of such requires consideration of the goals of the parties and, ultimately, the specific terms and conditions of the agreement and as such is beyond the scope of this review Our focus will be a branch of tort law, arguably the dominant branch, known as the law of negligence as this potentially affects the largest number of parties both inside and outside of the audit process.

TORT LAW - NEGLIGENCE

Negligence has two meanings When the term "negligence" is used by most people, it is simply for the purpose of condemning behaviour which falls below society's norms. However, when the law refers to "negligence", it is as a basis for assessing liability for injury and has a somewhat wider meaning To obtain an assessment of liability for the tort of negligence, an injured party must prove the existence of all of the constituent elements of negligence These constituent elements are simply and satisfactorily, for our purposes, described by the "ABC Rule"·

a duty of care exists, and
a) there has been a breach of that duty, and
b) damage has resulted from that breach;

Only if all of these constituent elements of legal negligence are present will an injured party recover from a wrong-doer What is the meaning of each?

Duty of Care

To establish a duty of care, Courts use the "neighbour principle", first articulated in 1932[1] in a case involving a snail in a bottle of ginger beer In that case the Court put it this way:

> *The rule that you are to love your neighbour becomes in law you must not injure your neighbour, and the lawyer's question, Who is my neighbour? Receives a restricted reply You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour Who, then, in law, is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question*

The duty of care in respect of overt actions is relatively easy to envisage For example, a builder owes a duty of care to protect the future occupants of a building from defects which pose a substantial danger to the health and safety of those occupants[2] It is easy to see that the future occupants are the legal "neighbours" of the builder

But who are the legal "neighbours" of professionals, such as auditors, who do not incorporate dangerous defects into structures but merely offer advice to someone involved in the process who may or may not be at risk? To whom is the duty of care owed - everyone in the world who may be at risk if the advice is not competent? Fortunately, long standing legal authority[3] has tailored the neighbour principle to encompass only those situations where a "special relationship" exists between the giver of the advice and the receiver of the advice and then only where there is reasonable reliance by the receiver on that advice

Breach of Duty

Once a duty of care has been established, one must ascertain the nature and quality of the duty owed - this is the standard of care - before a determination can be made as to whether it has been breached It is often said that one cannot do better than one's best, but this is insufficient for the law of negligence which asks "what would a reasonable person have done in the circumstances"? In 1856[4] a Court described negligence this way

> *Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do,*

The reasonable person is, of course, a complete fiction invented for the sole purpose of giving the Court a standard against which to judge the activities of the defendant He/she, though idealized, is certainly not perfect and is flexible enough to account for group variations In respect of professionals, such as auditors or designers, a reasonable person can be described as a "person of average competence exercising a particular calling[5]" In respect of specialists, the reasonable person is elevated to the higher standard of like specialists

Customary practice in an industry can provide a standard of care but it is not conclusive. While customary practice is, by definition, feasible, it will not be tolerated if it is known to be inadequate Again, would the reasonable person in that industry comply with that custom in light of its demonstrated dangers?

The introduction of Road Safety Audits will likely alter the standard of care for road design and construction Currently road designers, for example, are judged by what road designers of average competence would do in the circumstances The regular applications of safety specialist advice may render the current customary practice untenable with the result that road designers may be judged in the future by the higher standard of the safety specialist

Damage Resulting

There must be a link between the wrongful act and the damage, a connection known as "causation" Unfortunately, there are two types of causation, being "cause-in-fact" and "proximate cause" and this regularly causes confusion among layperson and expert alike.

Cause-in-fact involves a pure question of fact most commonly determined by the "but for" test, as in "but for the breach of duty of the defendant, the damage would not have occurred" The sweep of cause-in-fact is potentially very wide and, with a little analysis and imagination, one can see that the least act or omission of an individual can have a theoretical factual link to damage to someone on the other side of the world To control the theoretical reach, the law applies the concept of "proximate cause" (also known as "remoteness") which allows the Court to put practical limits on the reach of cause-in-fact. The application of proximate cause involves a complex question of law and is well beyond the scope of this paper

Governmental Liability - Special Case

At one time, governmental liability in tort law was governed by the principle "The King can do no wrong" This principle changed provincially with enactment of the Crown Proceedings Act[6], which provides

> *...the Crown is subject to all those liabilities to which it would be liable if it were a person*

Accordingly, governments now face the same basic liabilities in tort law as any citizen However due to the nature of government, which exercises its powers by statute but potentially bears duties arising under both statute and tort law, the neighbour principle seemed unsatisfactory This was addressed in 1977[7] by the Courts' adoption of a two-step test as follows

1 *First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity of neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter – in which case a prima facie duty of care arises*

2 *Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise...*

Courts are wary of usurping the role of government by imposing duties that may be in conflict with the wider social concerns inherent in the decisions of democratic governments This two-step test gave the Courts the flexibility to deal with those practical realities of governing in a democracy, especially the manner in which governments decide how to allocate limited resources

The result of the second step in the test is the development of a dichotomy between those decisions of government which should be exempt from liability on account of the policy of recognising the wider social goals encompassed by those decisions and those other decisions which should not be exempt because they are merely the implementation of such policy The Supreme Court of Canada puts it this way

> *"True policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors However, the implementation of those decisions may well be subject to claims in tort [8]"*

Whether a decision is a true policy decision or simply an implementation decision must be determined upon a full review of the facts The following are some indicia of true policy decisions[9] which have been suggested by the Courts

- generally made by persons of a high level of authority, though not necessarily so,
- often dictated by financial, economic, social or political factors or constraints,
- not merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness;

POTENTIAL LIABILITY OF PARTICIPANTS

A preliminary assessment of the liability of the participants in the audit process requires some assumptions to be made in order to control the scope of potential issues. For the purposes of this paper we have assumed that the owner of the road, the provincial government, has retained an auditor to review the design and construction of a new road ("New Road"). Funding for the audit is provided by an agency legally separate from the provincial government The designer is a consulting engineer and the builder is an independent contractor, both of which are employed by the provincial government pursuant to separate agreements

Owner

The provincial government has statutory power to construct and maintain roads by virtue of subsection 8(1) of the Highway Act, which states simply

> *The minister may construct, keep open and maintain a highway across any land taken under the powers conferred by this Act and no person shall, on any pretext or claim, hinder, delay or obstruct the construction, keeping open and maintenance of a highway*

Though not stated, there must be an implied power to design roads within the expressed power to construct

It will be noted that the legislature chose to use the term "may" in respect of the power, implying that the minister does not have the duty to design, construct or maintain roads. Notwithstanding this lack of an expressed duty, tort law will import a duty of care to design, construct and maintain[10] the roads reasonably and liability for failures in that regard, assuming any liability follows at all, will be on the provincial government

At a relatively high level, the provincial government will make a decision concerning roads and included in that decision is a provision for New Road That decision will doubtless incorporate considerations of financial, economic, social or political factors and must include some level of safety to satisfy those considerations It can be assumed that the decision includes how much to spend on design and construction, what standard of service is to be provided by New Road, the general route of New Road and many other matters It can also be assumed that the decision will include an audit/no audit choice That provincial government decision is likely a true policy decision and is, thereby, essentially immune from review by the Courts in respect of tort law

The provincial government will engage a designer and auditor and, ultimately, a builder Most of the decisions made in the design and construction, apart from any which arise directly from the true policy decision, are in respect of expert or professional opinion and technical standards and, thus, are likely mere implementation decisions which are reviewable by the Courts under tort law A failure by the provincial government, its designer, its auditor or its builder which results in damage or injury will likely visit liability upon the provincial government on account of its statutory role in highways

If the true policy decision included a decision to audit and if the auditor makes recommendations concerning the safety of the design or construction of New Road, must such be acted upon by the provincial government? Having made the true policy decision to audit, it is likely that the subsequent decisions on how to deal with the auditor's findings will be implementation decisions, arising merely from professional opinions and technical standards Accordingly, such decisions fall within the ambit of the tort law and the failure of the provincial government to incorporate the auditor's recommendations will be reviewed from the standpoint of reasonableness

A decision by the provincial government not to audit may well result in a road which is designed and constructed to a lower standard than would be the case if it were audited If made at the appropriate level, that decision would be a true policy decision and, accordingly, immune from review by tort law

The provincial government has options for controlling its liability It could, for example, negotiate its contracts with its designer, auditor and builder to transfer the risk of failure to those entities It could also attempt to immunize itself from tort law through exculpatory provisions in its controlling legislation

Designer

The designer, normally a firm of professional engineers, will be employed by the provincial government to produce a design for use in the construction of New Road. Under the terms of its contract of employment, it will owe a duty of care to the provincial government to produce a competent design, including competence in safety In addition, a common law duty of care on the designer to the provincial government in respect of competence in design will probably arise in tandem with the duty in contract. Such a duty to others, such as the contractor[11] and the travelling public may also arise

It is anticipated that the designer will be given certain parameters for New Road arising from the policy decision of the provincial government and that some of the parameters will be in respect of safety issues If the auditor identifies safety issues which arise from those parameters, is the designer protected by the provincial government's general immunity from tort liability for true policy decisions? The answer would appear to be "maybe"[12]

Assuming that the auditor identifies a safety issue that does not directly arise from the true policy decision of the provincial government, can the designer safely ignore such advice? As referenced above, the standard of care for the design of New Road may well be the higher standard of the auditor rather than the former standard of designers of average competence The designer's decisions in this regard are subject to review under tort law and, as indicated above, the designer probably ignores the advice at its peril with the test, again, being reasonableness

The designer's liability to the provincial government can be addressed in its contract of employment In addition, it may be that the designer can control some of its liability to the world at large by the inclusion of appropriate disclaimers in the design and construction documents[13]

Builder

The builder will be required by contract to follow the design provided by its employer for New Road and it owes contractual duties in that regard It may also have a common law duty of care not to construct some aspect of New Road which is not, to its knowledge, reasonably safe However, like the designer, the builder may enjoy some protection from the provincial government's general immunity in respect of true policy decisions

It is conceivable that the auditor of New Road will identify some safety issue in respect of the design or construction that will be brought to the attention of the builder Can the builder safely ignore that issue and escape a review under tort law if someone is injured? Probably not, unless the provincial government's immunity for pure policy decisions applies The prudent builder will either modify its construction in accordance with the auditor's recommendations or, if the fault is in design, obtain either a confirmation from the provincial government of a change in design to comply with the auditor's report or an indemnity from the provincial government against future liability if the builder is directed to comply with the original design

Auditor

The auditor will review the safety of the design and construction of New Road and will produce a report in that regard The employer, the provincial government, will receive the report and the auditor's duty of care to the provincial government in respect of the competence of the report are primarily a matter of contract law, though reliance upon the report by the provincial government will probably generate a common law duty of care, in tandem with the contractual duty, to be assessed by tort law in the event of a loss

It is conceivable that others will rely upon that report as well The designer and the contractor, as examples, may rely upon the report to confirm their own work and may suffer if the report has been negligently prepared Again, depending upon a special relationship and reasonable reliance, such reliance may generate a common law duty of care to be assessed by tort law in the event of a loss

Road Safety Auditors, like any other professional group, must conform to a standard of practice and their work is measured against that standard. Accounting auditors, for example, are judged by their conformance with generally accepted audit standards which have been developed in that industry The standard of practice for the new road safety audit industry will develop over time but will likely be related to expert road designers here and abroad

If the auditor identifies a safety issue in respect of the design or construction of New Road, he/she must include that issue in the report as the failure to do so will doubtless be a breach of the standard of care Whether there is a duty of care extending beyond reporting the issue is unknown.

Canadian law has consistently recognized the ability of an auditor to expressly disclaim an assumption of a duty of care[14] to the world at large It would be appropriate therefore, from the auditor's point of view, to include some appropriately worded disclaimer in its report

Funding Agency

If the Road Safety Audit is funded by an agency which is legally separate from the provincial government, will that agency bear any liability under tort law for any failures of the audit which cause damage or injury? Pure gratuitous funding would be unlikely to attract any liability However, input into the audit or participation in the flow of the audit results may change that simple situation into something more complicated and the scope of this paper prevents a more detailed analysis

TWO SPECIFIC EXAMPLES

The following are two specific examples, based upon this common scenario. It is the policy of the Owner that all roads will be designed in accordance with its "Standards Manual" The Owner (provincial government) engages the Designer (firm of engineers) to design a new road in accordance with the Standards Manual The Auditor, in reviewing the design, determines that a particular standard ("Factor X"), which has been adopted by the Designer directly from the Standards Manual, is inadequate and reports to the Designer and Owner

Example 1

The Owner is unwilling to modify the Standards Manual on account of the high cost of rectifying Factor X in all of its road designs and directs the Designer not to modify the design in accordance with the Auditor's advice The design is completed and the road is constructed Some years later, a motor vehicle accident occurs and Factor X is found to be a contributing cause

The Owner's potential for liability in this example, as explained previously, depends firstly upon the nature of its decisions Assuming that the decision to use the Standards Manual for all road design was a true policy decision, as was the decision to audit roads, how can one characterize the subsequent decision to not change the Standards Manual in the face of expert advice that it is deficient? In this example, the decision not to change the Standards Manual was based upon economic factors and may well be characterized as a true policy decision As such, it would be exempt from review in tort and both the Owner and the Designer would likely benefit from that exemption

Suppose, however, that the decision not to change the Standards Manual was based upon a technical difference between the Auditor and the Owner's staff, or a personality clash, or a mere whim In those circumstances the Owner's decision, and the Designer's subsequent decision to comply with the Owner's direction, may not receive the characterization of a true policy decision and would be open to review by the "reasonableness" test described above

Example 2

The Owner directs the Designer to modify the design in accordance with the Auditor's advice However, the Standards Manual is left unchanged through oversight A subsequent unaudited road is designed in accordance with the Standards Manual, including Factor X, and a motor vehicle accident occurs as a result

The Owner in this example clearly accepted the Auditor's opinion concerning Factor X and, acting reasonably, ensured that the design in question is modified This is surely an implementation of the true policy decisions to audit road designs and is the type of decision that is reviewed by the standard of "reasonableness" The failure to modify the Standards Manual would probably not attain that standard and liability would likely follow The Designer of the subsequent unaudited road will also be judged by the standard of reasonableness and the question will be whether Factor X should have been identified by a reasonable designer

Suppose that the Owner did not change the Standards Manual on account of the very limited application of Factor X to the road under design, rather than on account of oversight. The true policy decision which resulted in the Standards Manual may still apply to retain the exemption from liability If not, the question may be whether an owner, acting reasonably, would have put some mechanism in place to ensure that those situations where Factor X was operative are treated differently from the standard situations governed by the Standards Manual The question with respect to the Designer would be whether a reasonable designer would have recognized Factor X as a problem.

SUMMARY

The Road Safety Audit may be a new tool for enhancing the performance of the road system and, like any tool, it will have a legal impact upon those who wield it The purpose of this paper is merely to provide some basic legal analysis, the applicability of which is limited to the hypotheticals and examples considered The analysis and conclusions presented should not be applied to specific situations as such should be the subject of specific legal advice

[1] Donoghue v Stevenson [1932] A C 562,
[2] Winnipeg Condominium Corp v Bird Construction Co [1995] 1 SCR 85 .
[3] Hedley Byrne & Co v Heller & Partners [1963] 2 All ER 575,
[4] Blyth v Birmingham Water Works (1856) 11 Ex 781 @ 784
[5] Linden, Allen M. "Canadian Tort Law" 5th Ed @ p 136,
[6] RSBC 1979 c 86 s 2(c)
[7] Anns v Merton London Borough Council [1978] A C 728,
[8] Just v British Columbia [1990] 1 WWR 385 @ 403,
[9] Brown v British Columbia (1994) 89 BCLR (2d) 1,
[10] Just (supra)
[11] Edgeworth Construction Ltd v N D Lea & Associates (1993) 83 BCLR (2d) 145,
[12] Holbrook v Argo Road Maintenance (BCSC) Unreported (August 20, 1996),
[13] Edgeworth (supra),
[14] Wolverine Tube (Canada) Inc v Noranda (1994) 21 OR (3d) 264,

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